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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 665

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS,
Cross-Petitioners,

v.

THE UNITED STATES OF AMERICA, *Cross-Respondent.*

PETITION FOR A CROSS-WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Kiowa, Comanche and Apache Tribes of Indians pray that a cross-writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on July 16, 1958.

OPINION BELOW

The opinion of the Court of Claims, which is the subject of this cross-writ of certiorari, is reported at 163 F. Supp. 603 (Appendix A, *infra*, pp. 1a-11a); and the opinion denying the motion of the United States for rehearing is reported at 166 F. Supp. 939 (Appendix B, *infra*, pp. 11a-17a).

JURISDICTION

The original judgment of the Court of Claims, affirming the Indian Claims Commission award to cross-petitioners, was entered July 16, 1958. Petition for rehearing by the United States was denied on October 8, 1958. On January 3, 1959, an order was entered by Chief Justice Warren, extending the time for filing a cross-petition for a writ of certiorari, to and including February 5, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether, when the United States takes Indian tribal lands by legislative fiat without the consent of the tribes and pays the tribes less than one half the value of said lands, it has an obligation, in addition to paying the tribes the full value of said lands, to make the tribes whole by also paying an increment equivalent to interest to cover the delay in such payment.

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> "* * * nor shall private property be taken for public use, without just compensation."

Article 12 of Treaty of October 21, 1867, 15 Stat. 581, provided:

> "No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult

male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article III (VI) of this treaty."

Section 6 of the Act of June 6, 1900, 31 Stat. 672, the Act by which the tribal lands here in question were acquired, appears in full at pages 19-20 in the Appendix to Brief of Appellant, filed in the Court of Claims below in Appeals Docket No. 3-57 and nine copies of which have been filed here by cross-respondent under Paragraph 4 of Rule 21 of this Court (hereinafter cited as App.).

Pertinent portions of Sections 2 and 20 of the Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70a, 70s, are printed in Appendix C, *infra*, pp. 18a, 19a.

STATEMENT

This is a claim by the Kiowa, Comanche and Apache Tribes of Indians under the Indian Claims Commission Act, 60 Stat. 1049. Under the Act of June 6, 1900, 31 Stat. 672, the United States acquired 2,033,583 acres of tribal lands in what is now southwestern Oklahoma. The price paid by the United States, as set out in said Act of June 6, 1900, was $2,000,000. The Indian Claims Commission, upon complaint of the tribes, held that the tribes had never agreed to the terms of this legislation and, therefore, that they were entitled to recover the difference between the value of the lands and the price paid (App., p. 38); that its value on June 6, 1900, was $4,067,166 (App., p. 10-11); and that there were no off-sets or gratuities which should be charged against the net judgment of $2,067,166, in favor of the tribes (App., p. 8). No

interest or increment measured by interest was allowed to cross-petitioners (App., p. 8).

The United States appealed to the Court of Claims on the issues of liability, value and off-sets (Appendix B, *infra*, pp. 1a, 2a). The tribes cross-appealed on the ground of value and interest (Appendix B, *infra*, p. 2a).

The Court of Claims affirmed the Indian Claims Commission in all particulars and denied the motion of the United States for a rehearing.

On the question of interest, the Court of Claims held that no constitutional question was presented and, hence, no interest was allowable (Appendix A, *infra*, pp. 9a, 10a).

REASONS FOR GRANTING THE CROSS-WRIT

1. This case presents an important question of federal law which should be decided by this Court. The case of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, represented an early effort by cross-petitioner tribes to obtain redress for the acquisition of their tribal lands by the Act of June 6, 1900. In that case, this Court held that the acquisition of the same lands by the same means which are the subject of the litigation below was the exercise of the plenary power of Congress over Indian tribal property; and that the courts, therefore, were powerless to intervene, regardless of the wrong. As the result of the instant litigation in the Indian Claims Commission, as affirmed by the Court of Claims, it has now been judicially determined that the United States paid only 98.3 cents per acre in 1900, for land then worth $2.00 per acre. It is submitted that *the Lone Wolf case* should be reviewed and overruled to the extent that it holds that the taking of

tribal property without the consent of the tribe, at a value less than its true worth, does not represent a taking requiring, because of the delayed payment, the addition of an increment to make the parties whole.

2. The decision of the Court of Claims as to interest is contrary to decisions of this Court and the Court of Claims. The affirmed decision of the Indian Claims Commission held that the act of June 6, 1900, was, as to the tribes, "inoperative" and that the acquisition of the land here in question was "in disregard of the rights of the Indians under the Treaty of October 21, 1867" (App., p. 38). The decision of this Court in the case of *United States* v. *Blackfeather*, 155 U.S. 180, at page 191, upheld the payment of 5% interest to a tribe of Indians when the funds to which the tribe was entitled were not paid over when they should have been. This decision should be followed in the instant case, rather than *the Lone Wolf decision*.

The Court of Claims in the case of *Confederated Bands of Ute Indians* v. *United States*, 100 C. Cls. 413, 432, held that payment for tribal lands taken by legislative fiat should be as of the time of the taking. In *the Ute case* there was no payment provided for in the Act of Congress which passed title without the consent of the Indians. In the instant case there was a payment of less than one half the value provided in the Act of Congress which passed title without the consent of cross-petitioners. The distinction is hardly one of principle. The Court of Claims recognized this logical conflict when it stated:

> "While, as pointed out by the Indians, it is difficult to distinguish between an act of Congress which passes title to Indian land without the consent of the tribal owners and for no consideration,

> and an act of Congress which passes title to Indian land without the consent of the owners for only a portion of its true value at the time of acquisition, we think that the issue regarding the allowability of interest is not actually before the court in this appeal."[1]

The Indian Claims Commission (App., p. 134, et seq.) and the Court of Claims (Appendix B, *infra*, p. 10a) both recognized that *the Lone Wolf case*, unless modified, precluded payment of an increment measured by interest to the tribes. *The Lone Wolf case* is inconsistent with later pronouncements of this Court, where tribal lands are taken by the United States. *Shoshone Tribe* v. *United States*, 299 U.S. 476; *United States* v. *Creek Nation*, 295 U.S. 103. These later cases, which allowed an increment to make the payment contemporaneous with the acquisition, should be followed rather than *the Lone Wolf case* and the decisions below.

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[1] This language regarding the power of the Court of Claims to decide the point obviously overlooks Section 13 (b) of the General Rules of Procedure of the Indian Claims Commission, as follows:

> "Which issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues."

The tribal attorneys sought interest at every stage of the trial below. The Indian Claims Commission passed on the request for interest on the merits at the trial and on rehearing (App., pp. 132-135). Under the circumstances, the question was before the Court of Claims, and that Court was in error in seeming to conclude to the contrary.

The failure of the Indian Claims Commission and the Court of Claims to follow the law laid down in these cases so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a cross-writ of certiorari should be granted.

Respectfully submitted,

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